IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 18TH DECEMBER 2007 / 27TH AGRAHAYANA 1929

RSA.No. 1043 of 2007(G)

AS.7/2004 of SUB COURT,THODUPUZHA
OS.404/2002 of MUNSIFF COURT,THODUPUZHA

: APPELLANT/RESPONDENT/PLAINTIFF

P.R.SANTHAMMA, W/O.M.P.THANKAPPAN,
AGED 53 YEARS, MARIYIL HOUSE, POOMALA KARA,
VELLIYAMATTOM VILLAGE, THODUPUZHA.

BY ADV. SRI.GEORGE ZACHARIAH ERUTHICKEL

RESPONDENTS: APPELLANTS/DEFENDANTS

1. DEPUTY TAHSILDAR, REVENUE RECOVERY,
TALUK OFFICE, THODUPUZHA.

2. ASSISTANT DISTRICT INDUSTRIES
OFFICER, TALUK INDUSTRIES OFFICE,
THODUPUZHA.

3. STATE OF KERALA, REPRESENTED BY
DISTRICT COLLECTOR, IDUKKI.

BY

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 18/12/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A.2160/2007 IN R.S.A.NO.1043/2007

18.12.2007 DISMISSED Sd/- M.Sasidharan Nambiar
Judge

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO. 1043 OF 2007

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Dated this the 18th day of December, 2007

JUDGMENT

Plaintiff in O.S.404/2002 on the file of Munsiff Court, Thodupuzha is the appellant. Defendants are the respondents. Admittedly, Thankappan the husband of appellant applied for financial assistance before Taluk Industries Office, under Harijan Development Scheme for opening a Soda factory. Appellant was the guarantor. The loan was sanctioned. The amount was deposited with Union Bank of India, Kalayanthani Branch in the name of Thankappan with S.B. Account No.2686. It is also admitted case that Thankappan issued cheque 264121 for Rs.14,543/- in favour of Varghese and handed it over to the second respondent for delivery to Varghese who has to supply the machineries and accessories and According to appellant, Varghese did not supply the machinery and therefore

Thankappan could not start the factory. On the advice of second respondent, Thankappan filed a private complaint before Chief Judicial Magistrate Court, Thodupuzha against Varthese and got crime 82/91 registered against Varghese by Thodupuzha police for the offence under section 420 of IPC. Though a charge sheet was submitted as Varghese was absconding, the case was transferred to L.P. Register. Thankappan died in 1990. Contending that respodents are not entitled to realise the amount by recourse to Revenue Recovery Act, suit was filed seeking a decree for injunction when revenue recovery proceedings were initiated. Respondents in the written statement contended that the loan amount was sanctioned cheque dated 3.5.1990 for Rs.14,543/- was issued by Thankappan in favour of M/s. Universal Supplies Pala road, Thodupuzha and Thankappan acknowledged the receipt of the cheque and if the supplier did not deliver the machineries and the accessories it is for Thankappan to proceed against the suppliers and

respondents are entitled to realise the amount due from Thankappan from his assets and also against the appellant being the guarantor and therefore suit is not maintainable. It was also contended that suit is not maintainable under section 72 of Revenue Recovery Act.

2. Learned Munsiff on the evidence of Pws.1 and 2, DW1 and Exts.A1 to A5 and Exts.B1 to B3 granted a decree holding that respondents are not entitled to proceed against appellant under Revenue Recovery Act in the absence of evidence to prove the supply of machineries and accessories to Thankappan. Respondents challenged the judgment before Sub Court, Thodupuzha in A.S.7/2004. Learned Sub Judge on reappreciation of evidence found that suit is hit by Section 72 of Revenue Recovery Act and evidence establish that Thankappan issued the cheque and the amount was withdrawn and if Varghese did not deliver the machineries, that will not prevent respondents from realising the amount and set aside the judgment of

the trial court and dismissed the suit. It is challenged in the second appeal.

3. Learned counsel appearing for appellant was heard.

4. The argument of the learned counsel is that first appellate court having found that fraud was alleged by the appellant, should not have dismissed the suit as barred under section 72 of Revenue Recovery Act as the proviso specifically provide that the bar provided under the section will not be applicable if revenue recovery proceedings is challenged on the ground of fraud. Learned counsel also argued that evidence establish that Thankappan did not obtain the machineries and accessories, which were to be supplied by Varghese the proprietor Universal Suppliers and Thankappan filed a criminal complaint before the Magistrate pursuant to which Ext.A3 charge sheet was filed before the court against Varghese and therefore it is proved that though loan was sanctioned to Thankappan he did not

obtain the benefit under the loan scheme and therefore it should have been found that respondents are not entitled to realise the amount by recourse to revenue recovery proceedings. Learned counsel argued that in any case right of the appellant to challenge the revenue recovery proceedings by seeking a decree for declaration may be reserved.

5. It is admitted case that Thankappan was the beneficiary of Harijan Development Scheme and a loan of Rs. 15,000/- was sanctioned by second respondent to him. It is also admitted case that the loan amount was deposited in the S.B. Account of Thankappan before Kalayanthani branch of Union Bank of India. It is also admitted case that Thankappan issued a cheque for Rs.14,543/- to Varghese, Universal Suppliers and it was entrusted to second respondent to be countersigned and to hand it over to Varghese. It is also not disputed that Varghese had encashed the cheque from the Bank. It is on the allegation that as promised,

Varghese did not supply the machineries and accessories and alleging that Varghese thereby committed an offence under section 420 of IPC Thankappan lodged a complaint before the court and got crime 82/1991 registered by Thodupuzha police which later culminated in lodging Ext.A3 charge sheet. Evidence establish that respondents sanctioned the loan and the loan amount was deposited in the account of Thankappan and that amount was withdrawn by encashing the cheque issued by Thankappan and countersigned by second respondent. The argument of the learned counsel is that as machineries and accessories were not supplied second respondent should not have countersigned the cheque without satisfying himself that the machineries and accessories were supplied and as it was done Thankappan was not liable for the amount and therefore revenue recovery proceedings cannot be proceeded. As rightly found by first appellate court, Section 72 of Revenue Recovery Act squarely applies to the facts of this

case. Under section 72, every question arising between the Collector or authorised officer and the defaulter or his representative or any other person claiming any right through the defaulter, relating to the execution, discharge or satisfaction of a written demand issued under the Revenue Recovery Act shall be determined not by a suit but as provided under the said section. Though proviso enables a party to institute the suit in respect of any such question on the ground of fraud, unless fraud is pleaded such a suit is barred. Though learned counsel appearing for appellant argued that suit is based on fraud between second respondent and Varghese, plaint does not contain any allegation of fraud. As provided under Rule 4 of Order VI of Code of Civil Procedure in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence particulars which are necessary are to be specifically pleaded. In the absence of such pleading, it cannot be said that

the suit is saved by the proviso under section 72.

6. Moreover, the suit is only one for injunction. The liability due by deceased Thankappan who availed of the loan or the appellant who was a guarantor to the loan, cannot be decided in a suit without seeking decree for declaration of liability. There is no case that second respondent has the liability to supply the machinery or the accessories. Second respondent at best had the duty to satisfy himself that before withdrawing the amount sanctioned under the loan it is being utilised for the purpose for which the loan was sanctioned. When the order was placed with the Universal Suppliers for the supply of machinery and Thankappan issued a cheque to be countersigned by second respondent and the cheque was countersigned and later Varghese, the payee under cheque had withdrawn the amount, it cannot be said that second respondent did not discharge his liability. Hence appellant is not entitled to get a decree for injunction restraining respondents

from realising the amount as provided under the provisions of Revenue Recovery Act, without getting an adjudication of the liability of the appellant to pay the amount both as guarantor as well as legal heir of deceased Thankappan. In such circumstance, I do not find any substantial question of law involved in the appeal.

Appeal is dismissed. The dismissal of the appeal will not be a bar for the appellant in instituting a suit for declaration and alleging fraud.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006